REPORT

OF THE

COMMITTEE ON THE JUDICIARY SYSTEM,

RELATIVE TO THE POWER OF

TAXING JUDICIAL SALARIES,

AND OF

WITHDRAWING ADDITIONS MADE THERETO,

AFTER THE DATE OF COMMISSIONS:

BY MR. SULLIVAN.

Printed by Order of the Senate of Pennsylvania, April 3, 1844.

HARRISBURG:

ISAAC G. M'KINLEY, STATE PRINTER.

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1844.

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REPORT.

Mr. SULLIVAN, from the Committee on the Judiciary System, who were instructed by the Senate to enquire what action should be taken by the Legislature, in relation to a writ of mandamus recently awarded by the Supreme Court against Job Mann, State Treasurer, on the hearing whereof it was decided by that court:

1st. That the salaries of the Judges of the Supreme Court, and those of the President Judges of the Courts of Common Pleas, cannot be taxed: and

2d. That additions made to their salaries cannot be withdrawn by a subsequent Legislature.

A consideration of the soundness of the law laid down in these two propositions, is required in the proper discharge of the duty enjoined upon your committee, and involves principles of immense moment, and demanding the most careful and impartial deliberation. And before entering upon the consideration of these propositions, it is not irrelevant to the subject, to review, briefly, the condition of judicial compensation at the time these salaries were increased, as such a review will enable the Senate, and the public, to judge of the impropriety of such increase, and of the propriety of its withdrawal by the last Legislature.

On the 19th of July, 1839, when the additions were made to the judges salaries, the amount received by them the preceding year, with the additions made, appears as follows, viz:

Chief Justice Gibson,	for salary and	per diem	$3,738.66,	addition	$400=4,138.66
Justice Kennedy,	do.	do.	3,024.00,	do.	400=3,424.00
Justice Rogers,	do.	do.	2,896.00,	do.	400=3,296.00
Justice Huston,	do.	do.	2,980.00,	do.	400=3,380.00
Justice Sergeant,	do.	do.	2,672.00,	do.	400=3,072.00

Each of the Judges of the District Court, and Court of Common Pleas, and Court of General Sessions of the city and county of Philapelphia, received $2,000 per annum; and the addition then made of $600 each, increased their salaries to the sum of $2,600. Each Judge of the District Court, and the President Judge of the Court of Common Pleas of Allegheny county, received $2,000, which, with the addition then made of $500 each, increased their salaries to the sum of $2,500 per annum. The District Judge of the Erie District received $1,600 per annum, and mileage; and the addition then made of $400, increasing his salary to the sum of $2,000 per annum, and mileage on the circuit at the rate of fifteen cents per mile. And each other President Judge of the Common Pleas received $1,600, and the same mileage, which, with the addition then made, increased their salaries to the sum of $2,000, with mileage.

Such is the statement of the salaries of the judges at the date of the act making the additions, and of the amount of the additions then made by the Legislature. The section making these additions was added to a Bill incorporating the Easton Iron company—a very incongruous title indeed, and one which was well calculated to conceal from the public the enactment of such a law. From the Journals of the session of

1839, it appears this section was reported in the Senate under a proper title, which indicated its contents, and that the Bill was progressed in to the second reading, when it was postponed, and a resolution offered, which brought to the Journals a statement of the sums then received by the judges, which put an end to the Bill in the Senate, until the same section was added, in the House, to the Easton Iron Bill, and thus found its way again into the Senate, under circumstances where it could pass at a single reading; and perhaps because it was in company with another measure of as little merit, and requiring the aid of combination to pass it. Such a system of legislation cannot be too strongly condemned. This section, thus enacted, and thus making additions to the salaries of the judges, was repealed by the last Legislature. Of the necessity and propriety of such a repeal, let the public judge. The State Treasurer proceeded to discharge what he conceived to be his duty under this act, and under two former acts, imposing a tax on all salaries exceeding two hundred dollars, by retaining the tax on all of such salaries as were made payable at the Treasury; and by giving to the act repealing the law increasing the salaries of judges, the construction that its legitimate effect was to withdraw these additions from all the District Judges, and the Judges of the Court of General Sessions, without regard to the date of their respective commissions; and to withdraw also these additions from such of the Judges of the Supreme Court, and President Judges of the Courts of Common Pleas, as held by commissions bearing date prior to the act of the 19th of July, 1839, making these additions.

Samuel Hepburn, being one of the President Judges, holding a commission dated *prior* to the 19th July, 1839, made demand at the Treasury, of his quarter's salary, at the rate of $2,000 per annum, and mileage; and alleged that the Legislature had no power to pass a law imposing a tax on a judge's salary, or withdrawing an addition made to such salary, although made after the date of his commission, and his entry upon official duty. The Treasurer persisted in the adherence to his decision, and the result was, an application to the Supreme Court, by that President Judge, for a mandamus to compel the Treasurer to pay him the sum demanded. This writ was granted, and the Treasurer made, for answer thereto, his construction of the law and Constitution as already stated; and on hearing, the court awarded a *peremptory mandamus*, obliging the Treasurer to pay the sum demanded. The opinion of the court is lengthy and elaborate, and is delivered by Judge Rogers, the only judge on that bench whose commission bears date since the 19th of July, 1839, and, if the decision of the Treasurer be correct, the only judge on that bench who is not personally interested in that decision to the amount of four hundred dollars each per annum; and this judge, too, in any event, must be considered as interested in the question to the amount of the tax imposed on his salary, without regard to the date of his commission. Whether delicacy, if not a first principle of jurisprudence, which prevents a man from judging his own cause, should not have forbidden a decision on this subject by that court, in the *summary proceeding* of a *mandamus*, when this President Judge could have had his remedy at law, is a question for the public to decide. Suffice it to say, that the decision of a tribunal *less interested* in the result, would be much more likely to meet with public approbation; and such a tribunal, for that purpose, it was and is clearly within the power of the Legislature to create.

With regard to the power of the Legislature to reduce at pleasure, the salaries of all district judges, and of all judges of other extraordinary courts, such as the Court of General Sessions, being courts created by the Legislature, and having no necessary existence under the Constitution, none can entertain any reasonable doubt. These judges do not come within the protection of that clause of the Constitution, which prohibits the diminution of the salaries of the Judges of the Supreme Court, and of the President Judges of the Courts of Common Pleas; nor is it contended that the salaries of the judges of these extraordinary courts, are not the legitimate subjects of taxation; and thus your committee are brought back to the simple inquiry into the soundness of the two propositions already referred to, as decided by the Supreme Court.

1st. That the salaries of the Judges of the Supreme Court, and those of the President Judges of the Courts of Common Pleas, cannot be lawfully taxed.

The opinion of the Supreme Court is predicated upon a construction of a clause contained in the second section of the fifth article of the Constitution, which declares: "The Judges of the Supreme Court, and the President Judges of the Courts of Common Pleas, shall at stated times, receive an adequate compensation for their services, to be fixed by law, and which shall not be diminished during their continuance in office." The court decide, that a tax on a judge's salary is within the terms and meaning of this clause—a diminution of the salary—and cannot, therefore, be constitutionally imposed and collected. In order to a correct decision of this point, it must be borne in mind, that there are certain first principles of government which have an admitted existence, although the same may seem to conflict with the letter of the Constitution. Of this character is the right of every government to raise from the income, earnings and property of every description belonging to the citizen, such sums of money as may be found necessary to meet the wants of the government; and yet, the same Constitution which declares that a judge's salary shall not be diminished, also declares that the right to acquire and possess property, is the indefeasable right of all men. The patent from the Commonwealth, by which the tiller of the soil holds the farm from which, by the sweat of his brow, he produces his daily bread, reserves no right to the Commonwealth, to take back any part of his land, nor to sell any of its products from him, to raise a revenue to support the government; and yet, who ever doubted the existence of such a power in every government, as a first principle of its existence. Whatever the burthens of government may be, and whether incurred by reason of war, or by bad legislation, or by the prodigality of public servants, or by all these causes put together, they must be sustained by the public generally; and no citizen can rightfully say, that his lands, his earnings, or his salary are so hedged about by the Constitution, as to be beyond the reach of the government itself, whose creation is for the protection of all our rights. If this could be the case, it would be easy to imagine a state of things in which a government might be denied, by its citizens, the means necessary to preserve and continue the machinery of its own existence. The very term tax, which has its origin from the Greek word *taxis*, and means order and regularity of imposition, indicates that the same is to be levied and paid in regular order, out of the income and property of all the citizens, without regard to the source from which this income and property are acquired—whether it be from the receipt of a high salary from the government, or from the slow and daily earnings of the workshop, or from the still slower and more uncertain products of the farm. The Constitution never intended to make any such difference, and the law has never known any such distinction.

But it is idle to prolong this part of the inquiry, since we have the identical principle decided fourteen years ago, by the same Supreme Court, and at direct variance with the decision now under consideration. The case was this. The President Judge of the eighth district resisted the payment of a county tax, assessed upon his salary—a stated case was made for the opinion of his Associate Judges—either party to have a writ of error. The case was decided in favor of the President Judge; and the county took a writ of error, and on hearing thereof at July term, 1829, the court reversed the judgment, and entered judgment for the county. The case is reported in 2d Rawle, and on pages 77 and 78, a clear and decisive opinion of the court is delivered by his Honor, Chief Justice Gibson. In that case the tax was imposed under the act of 11th April, 1799, and the Chief Justice thus reasons upon the question:

"The ground assumed by the ingenious argument of the defendant is, that a construction which would bring the office of a President Judge within the provisions of the act of 11th April, 1799, would, at the same time bring that act into collision with a prohibition of the Constitution, which declares: "That the compensation of the Judges of the Supreme Court, and of the President Judges of the Courts of Common Pleas, shall not be diminished during their continuance in office." Taxes are assessed for county purposes under authority of the Legislature, which is undoubtedly incompetent to reduce the defendant's salary. But as the Constitution, like every other instrument, is to have a reasonable interpretation, the prohibition in question is to be restrained to laws which have such a reduction for their object, and not for their consequence.

On any other principle of construction, a tax could not be constitutionally assessed on property purchased with money drawn for a judge's salary, which would in reason have as fair a claim to exemption as the salary itself. If we once get away from the plain inartificial import of the prohibition, it is not easy to foretell at what stage of refinement we will stop. The object of the Legislature was to apportion the public burden according to the rates of property, and to produce in detail a result as near as possible to that of an income tax: a measure of assessment more equable in the abstract than any other that could be proposed. Now, there is no reason to exempt a judge from contribution, which is not just as applicable to any other officer who presents no tangible surface but his office to the revenue laws. Nor was the object of the prohibition to place him in this respect on higher ground. The Legislature could not constitutionally retrench a part of a judge's salary under the pretence of assessing a tax on it; but for the *bona fide* purpose of contribution, a reasonable portion of it, like any other part of his property, may be applied to the public exigencies."

The Chief Justice further states: "That it may not be easy to determine whether the powers of assessment extend to all offices, public or private, state or federal, legislative or executive. There can, however, be no question as to the office of a judge, which, producing a fixed income, is incontestibly within, not only the letter, but the reason of the law. We are of opinion, therefore, that according to a sound construction of the law, the defendant's office was properly assessed. Judgment of the court below reversed, and judgment rendered for the plaintiffs."

Such was the solemn decision of that court fourteen years ago, on the same clause of the Constitution—a decision which is as sound to-day, as it was when it was solemnly made, and should have been adhered to, until changed by a competent and disinterested tribunal of judges, whose own salaries were not in any wise to be effected by its reversal. Men and judges do change their opinions, and their judgments, but the true principles, and the true interpretation of the Constitution and the laws, are in all times past and to come, as unchangeable as are the immutable moral principles of right and wrong. It is in vain to take a distinction between a county tax, and a tax for State purposes, for it is the same power, the Legislature, which grants the authority to make the assessment, in either case, and consequently the same principle which is involved. So much for the right of the government to tax the salaries of judges; and this introduces us to a review of the other question decided by the Supreme Court.

2d. That additions made to these salaries cannot be withdrawn by the act of a subsequent Legislature:

That a subsequent Legislature does possess such a power, is, in the judgment of your committee, beyond all reasonable doubt, or successful refutation. The decision of the Supreme Court upon this point, is predicated upon the same clause of the Constitution, which, in the judgment of that court, contains the potent influence to protect, from the imposition of a tax, the salaries of the Judges of the Supreme Court, and of the President Judges of the Courts of Common Pleas. It will be borne in mind, that the provision of this clause of the Constitution is, that the compensation of this class of judges shall not be diminished during their continuance in office. The opinion of the court, on this clause, decides that the withdrawal of an addition made to these salaries, after the date of the commission, and after the entry upon official duty, is, in the eye and sense of the Constitution, as much a diminution of the salary as would be a withdrawal of a portion of the salary fixed at and before the date of such commission. A moment's reflection on the question, should demonstrate the error and fallacy of this construction. The object had in view by the framers of this clause of the Constitution, was to render this class of judges secure in the receipt of the salary affixed to their office at the time of their appointment, and their entry upon official duty. It was not the intention of that instrument to afford any further or greater protection, much less was it intended to make it all protection on the part of the judges, whose influence might, at some injudicious hour of legislation, induce large additions to their salaries, and no protection at all to the people of the government, whose next

representatives might be instructed, and from a sense of duty be compelled, to withdraw these additions, and leave these salaries to remain at the sums where the Constitution would protect them. This position is maintained by Judge Story, the ablest constitutional judge and lawyer of his day; and is also sustained by every consideration of reason and sound policy. In England, the salaries of judges may be increased or diminished to this day, by act of Parliament; but in most of the constitutions of this country, there is a provision against a reduction, the sole object of which is, to render the judges sufficiently independent of the other branches of the government, by securing them in the receipt of such compensation as was fixed by law, when they came into office, and for which they may have consented to surrender a lucrative practice in the legal profession. But does it follow, that because the framers of the Constitution desired to establish this proper security for the independence of the judiciary, they intended to create thereby, and put into the hands of the judiciary, and each Legislature, a *kind of indescribable screw*, which would work but one way, and that always upwards, for the increase of judicial salaries? What rank injustice to the tax payers of this Commonwealth, might such an instrument do, in the hands of a liberal, or a prodigal Legislature, beset with private solicitations to make large additions to judicial salaries; which, according to the decision of the Supreme Court, it would be beyond the power of a future Legislature to withdraw, when perhaps the causes set up for making these additions, were found to be insufficient, or had ceased to exist, or been discovered never to have had any existence at all. How might such a construction have been abused to a still greater extent under the old Constitution, when the judicial tenure was for life? All that the judiciary branch of the government would have to do, would be to make one successful move upon the sympathies and liberality of one Legislature, able to give *this extraordinary judicial screw one twist upwards*, and thus add hundreds or thousands of dollars to these salaries; and there they must remain fixed again, beyond the reach of another Legislature, except to fix them still higher.

Suppose some Legislature, under the influences already mentioned, or for any other cause, real or imaginary, or actuated by that *mad phrenzy* of *extravagance* which has for years characterized this government, had added to each judge's salary $5,000 per annum, instead of the additions which were made; these salaries, with the additions made, would, according to the position taken, be *equally secure* from the action of a future Legislature, who might feel bound to correct such an act of *extravagance* and *injustice* by its immediate repeal. No constitution, based in wisdom, could bear a construction which would put it in the power of a single Legislature to *do an act* which could never be *undone*, with regard to the main part of the subsisting judicial functionaries of the government, and which might be so *unjust* and *oppressive* in its character, as to be attended with the most disastrous consequences to the existence of the government. This is the way to test the principle, and to ascertain whether any soundness is contained in a position so monstrous and so much at variance with the true principles of a well regulated Constitution.

But, it is insisted by the judge who delivers the opinion, "*that twist it as you may*," the withdrawal of an addition made *after* the date of the commission, is a *diminution* of the salary. This depends altogether upon *the point of time* at which we estimate the salary, and *the point of time* at which the Constitution contemplates the salary *as fixed* with respect to each judge. If we estimate it as *fixed* at the date of the commission, it is *clearly no diminution*—if at the date of the act making the addition, it is also *no diminution* of the sum up to that time. But if we estimate the salary when it has been *unfixed* by an addition made, then it is true, it would take away the *gratuity* added to the *fixed* salary, and thus diminish the gross amount; but it would not diminish it below the sum fixed by law with respect to each judge, which is undoubtedly the sum *fixed* and *affixed* to his office at the time he consented to take upon himself its official duties. Any further addition to his salary must be regarded as *a gratuity*, which may be *added* or *withdrawn* by the Legislature, according to the condition of the finances of the government, or the existence of other sufficient causes.

But it is further urged by the judge, that the clause of the Constitution under which the judges claim protection, is a part of the amended Constitution; and that the words "to be fixed by law," as contained therein, contemplate *future* action of the Legislature *fixing* the salaries of the judges, and *an increase* of these salaries, to compensate for the reduction of the judicial tenure. These are most extraordinary *premises*, and as extraordinary *conclusions*. It is incomprehensible, how the learned judge could have forgotten that, in the clause referred to, there is not a *sentence* nor a *word* altered or amended by the Convention of 1838. It stands *verbatim et literatim* as it came from the hands of the Convention of 1790, when it was proper that the words "to be fixed by law," should be used, because it was only at that time the judiciary was established, and in 1790 and 1791 that their salaries were fixed. Nor can it be urged, that although this clause was not amended, nor an amendment to the Constitution, yet it was a part of that instrument as adopted by the people in 1838, and must be construed as if the entire instrument had then gone into force for the first time. This position might be urged, with plausibility, if the second section of the schedule to the amended Constitution, had not declared that "the clauses, sections and articles of said Constitution, which remain unaltered, shall continue to be construed and have the same effect as if the said Constitution had not been altered." If the construction given by the judge be correct, then the schedule is useless, and a dead letter; and the intentions of that learned Convention are, in this respect, rendered *nugatory*, and the *beauty* and *system* intended to be secured by that schedule are *marred* and *defeated*.

Let us test this position further. In the old Constitution it is provided in the second section: "That each county shall have at least one representative, but no county hereafter erected shall be entitled to a separate representation, until a sufficient number of taxables shall be contained within it, to entitle them to one representative." This clause is retained in the new Constitution and unamended. Now, if we apply to this clause, the rule laid down by the judge, and thus deprive the schedule of its proper office, the result would be, that every new county formed before the adoption of the amended Constitution of 1838, would be entitled to a representative without regard to the number of its taxable inhabitants:—a construction never insisted upon by any legislator who understood the Constitution, and his duties under it. This schedule carries back every unamended "article, section and clause," to the year 1790, the date of their adoption; and secures to them "the same effect in all respects as if no change had been made in other parts of that instrument." If this position is correct, it also demolishes another position taken by the judge predicated upon the same error of construction, in which he likens this action of the first Legislature under the amended Constitution, increasing the salaries of the judges, to the action of the same Legislature in classifying the Associate Judges. He argues that in the case of the Commonwealth *vs.* Leib, it was decided that the first Legislature having classified these judges, the legislative power was exhausted, and no future Legislature could change this classification; and that by parity of reasoning, the same Legislature having made additions to the salaries of the judges, no future Legislature could change these salaries by withdrawing these additions!—A single sentence distinguishes the two cases as clearly as the sun at noon-day. In the case of the classification of the Associate Judges, it is a power expressly given to the first Legislature under the amended Constitution. In the case of the salaries of judges there is no power given to any Legislature in particular, other than the general power given in the Constitution of 1790. The argument of the judge would prove too much for his purpose; for if, as in the classification of the Associate Judges, the first Legislature were to be intrusted with the special power of fixing the salaries of the judges, then would the subject of fixing, altering and changing these salaries be forever, under the present Constitution, out of the power of any future Legislature—a position which only requires to be stated, to secure the condemnation of every legal mind. Such a position would prohibit, not only legislation, which would diminish, but legislation also which would increase, the salaries of judges then in office; and which would increase or diminish the salaries to be paid to judges, who might receive their commissions thereafter! Legislation would be exhausted by the action of the first Legislature un-

der the amended Constitution upon the subject of these salaries; a result which would be altogether impolitic, if not absurd. It is, therefore, conclusive that there is nothing contained in the amended Constitution, which gives to the first Legislature under it that exclusive power to legislate on this subject, which is expressly given in relation to the classification of the Associate Judges; and which, when once exercised, cannot be resumed, nor the action changed by future legislation.

From these, and other strong considerations which might be presented, your committee entertain no doubt of the constitutional power of the Legislature, to impose a tax on all salaries of office, including those of the Judges of the Supreme Court, and of the President Judges of the Courts of Common Pleas; and that their compensation, as judges, is always subject to a withdrawal of all gratuities or additions made thereto after the date of their respective commissions, without any infringement upon the constitutional protection afforded. The judgment of your committee is further, that the tax imposed by law upon these judicial, and other salaries, as also the withdrawal of the additions made thereto by the Legislature of 1839, are warranted by every consideration of duty and justice toward the entire tax-paying constituency of this Commonwealth; and that the same should be enforced by proper instructions to the State Treasurer, aided by *specific appropriations* in accordance therewith, for *the judiciary expenses;* and also *by a legislative provision*, which would restrain the *free use* of the writ of *mandamus against that officer;* and especially, prohibit *its exercise* in cases where the tribunal which is *to decide upon it*, and *enforce its execution*, is *involved in a pecuniary interest, in the decision of the question.*

Resolved, That the committee be discharged from the further consideration of the subject.